

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today was **not** written for publication is **not** binding precedent of the Board.

Paper No. 37 (90/003,684)

Paper No. 37 (90/003,996)

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte McNEIL-PPC, INC.

Appeal No. 1998-2764
Reexamination Control Nos. 90/003,684 and 90/003,996¹

ON BRIEF

Before ABRAMS, FRANKFORT and McQUADE, Administrative Patent Judges.

McQUADE, Administrative Patent Judge.

DECISION ON APPEAL

McNeil-PPC, Inc. appeals from the final rejection of claims 1 through 16, all of the claims pending in these merged

¹These reexamination proceedings, now merged pursuant to 37 C.F.R. § 1.565(c), involve U.S. Patent No. 4,940,462, granted July 10, 1990, based on Application 07/160,739, filed February 26, 1988.

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reexamination proceedings involving U.S. Patent No. 4,940,462.

Claims 1 through 7 are patent claims and claims 8 through 16 are new claims.

THE INVENTION

The invention relates to "protective, absorbent liners for undergarments and more particularly, to providing more leak resistance for sanitary napkins having folding side panels or wings" (specification, column 1, lines 14 through 17). Claims 1, 7 and 8, the three independent claims on appeal, are illustrative and read as follows:

1. A sanitary napkin comprising

(a) an absorbent element having longitudinally extending sides, transverse ends, a body-facing side and an undergarment facing side; and

(b) stretchable, longitudinally resilient flaps extending outwardly along said longitudinally extending sides, said flaps expanding longitudinally when folded over a side of a crotch portion of an undergarment.

7. A sanitary napkin comprising:

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(a) an absorbent element having longitudinally extending sides, transverse ends, a body-facing side and an undergarment facing side; and

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(b) flaps extending laterally from and substantially along the entire length of each of said longitudinal sides of said absorbent element, said flaps having longitudinally expandable portions therein, whereby said flaps can be expanded to fold over a crotch portion of an undergarment to provide sanitary protection substantially along said entire length of each of said longitudinal sides.

8. A sanitary napkin comprising:

(a) an absorbent element having longitudinally extending sides, transverse ends, a body-facing side, and an undergarment-facing side and;

(b) stretchable, longitudinally resilient side flaps which are affixed to and extend laterally from each of said longitudinally extending sides of said absorbent element, said side flaps having longitudinally expandable portions therein, said side flaps expanding longitudinally when folded over a side of a crotch portion of an undergarment.

THE PRIOR ART

The references relied upon by the examiner as evidence of anticipation and obviousness are:

Korpman	4,166,464	Sept. 4, 1979
Van Tilburg	4,589,876 ²	May 20, 1986

²Despite evidence of some confusion in the final rejection (Paper No. 16) and main brief (Paper No. 28), U.S. Patent No. 4,589,876 is the Van Tilburg patent which is at issue as an applied reference in this appeal (see n.1 on page 7 in the examiner's answer, Paper No. 34).

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Fahrenkrug	4,891,258	Jan. 2, 1990 (filed Dec. 22, 1987)
Baird et al. (Baird) British Patent Document	2,168,253	Jun 18, 1986

THE REJECTIONS

Claims 1 through 13, 15 and 16 stand rejected under
35 U.S.C. § 102(b) as being anticipated by Korpman.

Claims 1, 2, 7 through 9, 15 and 16 stand rejected under
35 U.S.C. § 102(b) as being anticipated by Baird.

Claims 3 through 6 and 10 through 13 stand rejected under
35 U.S.C. § 103 as being unpatentable over Baird.

Claims 1 through 16 stand rejected under 35 U.S.C. § 103
as being unpatentable over Van Tilburg in view of Fahrenkrug.

Attention is directed to the appellant's main and reply
briefs (Paper Nos. 28 and 35 in each proceeding) and to the

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examiner's answer (Paper No. 34 in each proceeding) for the respective positions of the appellant and the examiner with regard to the merits of these rejections.^{3,4}

DISCUSSION

I. The 35 U.S.C. § 102(b) rejection of claims 1 through 13, 15 and 16 as being anticipated by Korpman.

Korpman discloses absorbent dressings such as diapers,

³The file in each proceeding contains additional briefs (Paper Nos. 25, 29 and 32) and answers (Paper Nos. 27 and 30) which appear to have been made of record mistakenly. These papers have been vacated, withdrawn or denied entry by the examiner (see page 1 in the answer, Paper No. 34) without any objection by the appellant. Accordingly, we have not considered the arguments advanced in these additional briefs and answers in evaluating the rejections on appeal.

⁴The examiner has not advanced any authority supporting the proposition that "[a]ny new arguments presented by Appellant after final or in [the main brief] are not timely" (answer, page 9). All of the arguments in the appellant's main and reply briefs should have been considered and responded to in the answer (see MPEP § 1208), and all such arguments have been considered by this panel in deciding the appeal.

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surgical and first aid dressings, sanitary napkins and the like which are designed to overcome the problem of insufficient conformability to the wearer's body (see column 1, lines 7 through 20). In general, the dressings consist of an absorbent pad and a backing sheet. According to Korpman (see column 1, lines 21 through 48), the conformability of a dressing can be enhanced by making its backing sheet elastic, easily stretchable and highly flexible. Korpman also teaches that the backing sheet may extend beyond the edges of the absorbent pad to form flaps (see column 2, lines 33 through 38). The reference specifically describes and illustrates several embodiments of improved dressings, including a number of diapers (Figures 1 through 5 and 10 through 18), an adhesive bandage strip (Figures 6 and 7), and a sanitary napkin (Figures 8 and 9). Of particular interest is that the aforementioned flaps appear in certain of the diaper embodiments (see Figures 3, 4 and 10 through 18), but not in the sanitary napkin embodiment.

Anticipation is established only when a single prior art

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reference discloses, expressly or under principles of inherency, each and every element of a claimed invention. RCA Corp. v. Applied Digital Data Sys., Inc., 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984). In other words, there must be no difference between the claimed invention and the reference disclosure, as viewed by a person of ordinary skill in the field of the invention. Scripps Clinic & Research Found. v. Genentech Inc., 927 F.2d 1565, 1576, 18 USPQ2d 1001, 1010 (Fed. Cir. 1991). It is not necessary that the reference teach what the subject application teaches, but only that the claim read on something disclosed in the reference, i.e., that all of the limitations in the claim be found in or fully met by the reference. Kalman v. Kimberly Clark Corp., 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983), cert. denied, 465 U.S. 1026 (1984).

The examiner, acknowledging that Korpman's sanitary napkin embodiment does not respond to the flap limitations in independent claims 1, 7 and 8, nonetheless contends that Korpman's diaper embodiments meet all of the limitations in

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these claims (see pages 5 and 9 through 12 in the answer).

The basic reasoning underlying this determination is that "the recitation 'a sanitary napkin' has not been given patentable weight . . . [because] Appellant has not claimed any structure that distinguishes a sanitary napkin from a diaper and a diaper is capable of use as a sanitary napkin" (answer, pages 9 and 10).

Korpman, however, belies the examiner's position. As indicated above, this reference discloses sanitary napkins and diapers as separate structural entities. In this light, the recitation in the preambles of claims 1, 7 and 8 of a "sanitary napkin" cannot reasonably be read on Korpman's diaper embodiments. In other words, a person of ordinary skill in the art, considering Korpman's disclosure as a whole, would not view the diapers described therein as sanitary napkins. Since Korpman's diapers do not meet the preamble recitations in claims 1, 7 and 8 of a "sanitary napkin" and Korpman's sanitary napkin does not meet the limitations in these claims relating to the "flaps," Korpman cannot be said to disclose structure which meets each and every element of

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the invention set forth in these claims.

Therefore, we shall not sustain the standing 35 U.S.C.
§ 102(b) rejection of claims 1, 7 and 8, or of claims 2
through 6, 9 through 13, 15 and 16 which depend therefrom, as
being anticipated by Korpman.

II. The 35 U.S.C. § 102(b) rejection of claims 1, 2, 7 through
9, 15 and 16 as being anticipated by Baird.

Baird discloses a catamenial pad 10, i.e., a sanitary
napkin, composed of a liquid permeable topsheet 12, a liquid
impermeable backsheet 14 and an absorbent core 16. The
topsheet and backsheet extend outwardly from the lateral edges
24 of the absorbent core to form flaps 26-29 which incorporate
strips of elastic material 21. As explained by Baird,

[t]he strips of elastic material 21 are affixed
to the backsheet material. Prior to affixing, the
strips are stretched to 150-300%, preferably about
200%, [of] their original length. The strips are
preferably placed at a distance of 1 to 5 mm from

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the outer edge of the side flaps. The elastics act as folding means, that is, they keep the backsheet sideflaps 29 in an upwardly folded configuration. At the same time, the strips of elastic material impart a curvature to the absorbent core, as shown in Fig. 1. Instead of elastic strips, other elastic means, like heat shrinkable tape or elastic glue, may be used. The backsheet 14 has a cup-like configuration, thus providing a reservoir capable of holding menstrual fluid at incidents of large flow and allowing the time necessary for complete uptake by the absorbent core 16 [page 3, lines 103 through 118].

Notwithstanding the appellant's arguments to the contrary (see pages 18 through 24 in the main brief and pages 15 and 16 in the reply brief), the examiner's determination (see pages 6, 12 and 13 in the answer) that Baird discloses, expressly or under principles of inherency, each and every element of the invention recited in claims 1, 2, 7 through 9, 15 and 16 is well founded. Although the appellant is correct in noting that Baird does not teach that the side flaps on the sanitary napkin disclosed therein are foldable over a crotch portion of an undergarment as set forth in independent claims 1, 7 and 8, it is not apparent, nor has the appellant cogently explained, why Baird's side flaps are not inherently capable of being so

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folded. Thus, Baird meets these functional or intended use limitations under principles of inherency. The related argument that Baird's side flaps are not longitudinally stretchable or expandable as recited in claims 1, 7 and 8 is also unpersuasive. Baird's disclosure of the manner in which elastic strips 21 are affixed to the flaps in a stretched condition indicates that the strips perform their stated function of folding the flaps upwardly and imparting curvature to the absorbent core by elastically gathering or bunching the flaps. These gathered or bunched flaps would be longitudinally stretchable or expandable against the force of the elastic strips.⁵ Furthermore, Baird's side flaps are disposed substantially along the entire length of the longitudinal sides of the napkin as recited in claims 2, 7 and 9, and, as discussed above, comprise extended portions of the body facing side and undergarment facing side of the napkin as recited in claims 15 and 16, respectively.

⁵ Indeed, Baird's flap construction appears to be essentially similar to the longitudinally stretchable/expandable flap embodiment illustrated in the appellant's Figures 3 and 4.

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Hence, we shall sustain the standing 35 U.S.C. 102(b) rejection of claims 1, 2, 7 through 9, 15 and 16 as being anticipated by Baird.

III. The 35 U.S.C. § 103 rejection of claims 3 through 6 and 10 through 13 as being unpatentable over Baird.

Dependent claims 3 and 10 require the flaps to comprise outwardly extending concave sides. The appellant disputes the examiner's conclusion that "whether the flap edges are straight or are curved to follow the edges of the napkin pad is a matter

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of mere design choice that is not separately patentable" (answer, page 7) by asserting that this feature is a "substantial advancement in sanitary napkin design" (main brief, page 25). These opposing viewpoints, however, are not relevant to the subject matter actually recited in claims 3 and 10 which make no mention of flap edges. As shown in Figures 1 and 4, the Baird side flaps comprise outwardly extending concave sides, and such structure is sufficient to meet the rather broad limitations in claims 3 and 10.

Dependent claims 4 through 6 and 11 through 13 specify various flap expansion percentages. The appellant's contention (see page 25 in the main brief and pages 15 and 16 in the reply brief) that Baird's flaps are not suggestive of this subject matter because they are not expandable at all is not persuasive for the reasons explained above. The 37 C.F.R. § 1.132 declaration of Dr. Bernard Lichstein filed August 9, 1996 is of no help to the appellant (see page 25 in the main brief) because it pertains to a prior art flap construction which differs substantially from that disclosed by Baird. In

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short, Baird's description of the extent to which elastic strips 21 are stretched before being applied to their flaps provides reasonable support for the examiner's conclusion of obviousness with regard to the expansion percentages set forth in claims 4 through 6 and 11 through 13.

Therefore, we shall sustain the standing 35 U.S.C. § 103 rejection of claims 3 through 6 and 10 through 13 as being unpatentable over Baird. In addition, we designate our action here with respect to claims 3 and 10 as a new ground of rejection to allow the appellant a fair opportunity to react to our reasoning which differs somewhat from that espoused by the examiner.

IV. The 35 U.S.C. § 103 rejection of claims 1 through 16 as being unpatentable over Van Tilburg in view of Fahrenkrug.

Van Tilburg discloses a sanitary napkin having a central absorbent pad and flaps extending from the longitudinal edges of the pad for folding around the sides of the crotch portion

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of a panty. As described by Van Tilburg,

[s]anitary napkin 10 comprises a central absorbent pad which is generally referred to by reference numeral 12. Central absorbent pad 12 is comprised of a liquid pervious topsheet 14, absorbent core 16 and liquid impervious backsheet 18. Secured to backsheet 18 is a layer of adhesive 20 which is covered by removable release liner 22. Extending from each longitudinal edge of the central absorbent pad 12 are flaps 24 and 24'. Flaps 24 and 24' are preferably of similar configuration and, therefore, the detailed description of flap 24 will be understood to be applicable to the [flap] 24'. A line of juncture 26 is formed where flap 24 joins the longitudinal edge of central absorbent pad 12. Flap 24 comprises liquid pervious flap topsheet 28, flap absorbent core 30 and liquid impervious flap backsheet 32. Flap 24 is flexible along an axis 34. Secured along the outer edge of flap backsheet 32 is a layer of flap adhesive 36 which is covered by removable flap release liner 38 [column 3, lines 12 through 29].

Van Tilburg teaches that this sanitary napkin construction is particularly leak-resistant due to the fact that it bends at the line of juncture between each flap and the longitudinal edge of the central absorbent pad (see, for example, column 8, lines 14 through 31).

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It is not disputed that Van Tilburg meets all of the
limitations in representative claim 1 except for those
requiring

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the flaps to be stretchable and longitudinally resilient so as to expand longitudinally when folded over a side of a crotch portion of an undergarment.

Fahrenkrug discloses

a stretchable absorbent composite for receiving, absorbing and retaining liquids and waste materials comprising a liquid-pervious layer, a liquid-impervious layer, an absorbent layer, and a liquid-pervious stretchable layer between the liquid-pervious layer and liquid-impervious layer. The stretchable layer is stretch-bonded to the other layers and forms a plurality of rugosities in the other layers upon relaxing the stretchable layer [column 1, lines 41 through 49].

According to Fahrenkrug (see column 3, line 62, through column 4, line 10), the rugosities and associated wrinkles and air pockets in the composite provide the benefits of increased body surface dryness and increased capacity for receiving, absorbing and retaining liquid.

The examiner's conclusion that "[i]t would have been obvious to one having ordinary skill in the art at the time

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the invention was made to provide the winged sanitary napkin of Van Tilburg with the stretchable, elastic absorbent composite of Fahrenkrug" (answer, page 8), thereby arriving at the subject matter recited in representative claim 1, is well taken. In this regard, Fahrenkrug's teaching of the above noted advantages of the stretchable absorbent composite would have provided the artisan with ample suggestion or motivation to modify the Van Tilburg napkin in the manner proposed.

The appellant's position that the proposed combination of Van Tilburg and Fahrenkrug rests on impermissible hindsight (see pages 26 through 28 in the main brief and pages 16 through 20 in the reply brief) is not convincing for a number of reasons. For the most part, this line of argument is based on the individual deficiencies of Van Tilburg and Fahrenkrug with respect to the claimed subject matter. Non-obviousness, however, cannot be established by attacking references individually where, as here, the rejection is based upon the teachings of a combination of references. In re Merck & Co., Inc., 800 F.2d 1091, 1097,

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231 USPQ 375, 380 (Fed. Cir. 1986). Additionally, while the appellant's contention that "[n]either of the cited references provides any motivation to selectively form [Van Tilburg's] side

flaps with longitudinally extensible material" (main brief, page 27) is arguably correct, such does not accurately reflect the examiner's position that it would have been obvious to form the entire Van Tilburg sanitary napkin of the Fahrenkrug composite. Such modification would of course result in stretchable, longitudinally resilient flaps which would expand longitudinally when folded over a side of a crotch portion of an undergarment. Finally, the appellant's observation that neither reference is directed to the problem of making conformable wings on a sanitary napkin is refuted by Van Tilburg's emphasis on flap flexibility. Moreover, the law does not require that references be combined for the reasons contemplated by the inventor as long as some motivation or suggestion to combine them is provided by the prior art taken as a whole. In re Beattie, 974 F.2d 1309, 1312,

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24 USPQ2d 1040, 1042 (Fed. Cir. 1992). As indicated above, the combined teachings of Van Tilburg and Fahrenkrug provide ample motivation or suggestion for the proposed combination.

Thus, the collective teachings of Van Tilburg and Fahrenkrug justify the examiner's conclusion that the differences between the subject matter recited in representative claim 1 and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art. Accordingly, we shall sustain the standing 35 U.S.C. § 103 rejection of claim 1 as being unpatentable over Van Tilburg in view of Fahrenkrug.

Since the appellant has not argued separately the patentability of any particular claim apart from the others with respect to the rejection at hand, all of the other claims so rejected shall stand or fall with representative claim 1 (see In re Young, 927 F.2d 588, 590, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991); In re Wood, 582 F.2d 638, 642, 199 USPQ 137,

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140 (CCPA 1978)). Thus, we also shall sustain the standing 35
U.S.C. § 103 rejection of claims 2 through 16 as being
unpatentable over Van Tilburg in view of Fahrenkrug.

NEW REJECTION

The following new rejection is entered pursuant to 37
C.F.R. § 1.196(b).

Claim 14 is rejected under 35 U.S.C. § 112, first
paragraph, as being based on a specification which does not
comply with the written description requirement of this
section of the statute.

The test for determining compliance with the written
description requirement is whether the disclosure of the
application as originally filed reasonably conveys to the
artisan that the inventor had possession at that time of the
later claimed subject matter, rather than the presence or
absence of literal support in the specification for the claim

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language.

In re Kaslow, 707 F.2d 1366, 1375, 217 USPQ 1089, 1096 (Fed. Cir. 1983). The content of the drawings may also be considered in determining compliance with the written description requirement. Id.

Dependent claim 14 recites that the flaps include attachment adhesive. While the original disclosure mentions attachment adhesives (see column 5, lines 8 through 22), it does not specify that these attachment adhesives are included in the flaps. Thus,

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the disclosure of the application as originally filed would not reasonably convey to the artisan that the inventor had possession at that time of the subject matter now recited in claim 14.

SUMMARY

The decision of the examiner:

- a) to reject claims 1 through 13, 15 and 16 under 35 U.S.C. § 102(b) as being anticipated by Korpman is reversed;
- b) to reject claims 1, 2, 7 through 9, 15 and 16 under 35 U.S.C. § 102(b) as being anticipated by Baird is affirmed;
- c) to reject claims 3 through 6 and 10 through 13 under 35 U.S.C. § 103 as being unpatentable over Baird is affirmed; and
- d) to reject claims 1 through 16 under 35 U.S.C. § 103 as being unpatentable over Van Tilburg in view of Fahrenkrug is affirmed.

In addition, a new rejection of claim 14 is entered

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pursuant to 37 C.F.R. § 1.196(b), and the affirmance of the 35
U.S.C.

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§ 103 rejection of claims 3 and 10 as being unpatentable over
Baird is designated as a new rejection under 37 C.F.R.

§ 1.196(b).

In addition to affirming the examiner's rejections of one
or more claims, this decision contains new grounds of
rejection pursuant to 37 C.F.R. § 1.196(b) (amended effective
Dec. 1, 1997, by final rule notice, 62 Fed. Reg. 53,131,
53,197 (Oct. 10, 1997), 1203 Off. Gaz. Pat. & Trademark Office
63, 122 (Oct. 21, 1997)). 37 C.F.R. § 1.196(b) provides, "A
new ground of rejection shall not be considered final for
purposes of judicial review."

Regarding any affirmed rejection, 37 C.F.R. § 1.197(b)
provides:

(b) Appellant may file a single request for
rehearing within two months from the date of the
original decision

37 C.F.R. § 1.196(b) also provides that the appellant,
WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise

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one of the following two options with respect to the new
grounds

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of rejection to avoid termination of proceedings (37 C.F.R.
§ 1.197(c)) as to the rejected claims:

(1) Submit an appropriate amendment of the
claims so rejected or a showing of facts relating to
the claims so rejected, or both, and have the matter
reconsidered by the examiner, in which event the
application will be remanded to the examiner. . . .

(2) Request that the application be reheard
under § 1.197(b) by the Board of Patent Appeals and
Interferences upon the same record. . . .

Should the appellant elect to prosecute further before
the Primary Examiner pursuant to 37 C.F.R. § 1.196(b)(1), in
order to preserve the right to seek review under 35 U.S.C. §§
141 or 145 with respect to the affirmed rejections, the
effective date of the affirmance is deferred until conclusion
of the prosecution before the examiner unless, as a mere
incident to the limited prosecution, the affirmed rejections
are overcome.

If the appellant elects prosecution before the examiner
and this does not result in allowance of the application,

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abandonment or a second appeal, this case should be returned
to the Board of

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Patent Appeals and Interferences for final action on the
affirmed rejections, including any timely request for
rehearing thereof.

No time period for taking any subsequent action in
connection with this appeal may be extended under 37 C.F.R.
§ 1.136(a).

AFFIRMED; 37 C.F.R. § 1.196(b).

	NEAL E. ABRAMS)	
	Administrative Patent Judge)	
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)	BOARD OF PATENT
	CHARLES E. FRANKFORT)	
APPEALS	Administrative Patent Judge)	AND
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INTERFERENCES)	
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